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# The CBSS as a Vehicle for Institutionalised Governance in the Baltic Sea Area, in comparison with Its Two Sister Organisations in the North

Timo Koivurova and Allan Rosas

## 1. Introduction

The aftermath of the Second World War witnessed an important development of the international legal and institutional order through the creation of written rules (conventions and other treaties) and intergovernmental organisations. Especially since the 1970s and 1980s, this trend has gradually weakened and new, more informal and flexible forms of international cooperation have emerged instead, in the form of ‘declarations’, ‘conclusions’, ‘memoranda of understanding’ and other ‘soft law’ instruments, including the setting up, through such instruments, of institutionalised frameworks.

In an increasingly diverse and dynamic international system it is not surprising that there is often a perceived need for flexible forms of cooperation, which are not based on treaties as their constituent instruments. One important reason for this trend is that ‘soft’ instruments may offer a pragmatic way of moving forward without the need for the formal procedures required for the conclusion of treaties, avoiding the risk that national conclusion procedures take time and may at the end prevent some States or other actors from participating.<sup>1</sup> While the notion of ‘soft law’ instruments is well-known since the 1970s and 1980s,<sup>2</sup> it has to be acknowledged that it is not a precise legal concept.<sup>3</sup>

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<sup>1</sup> D Shelton, ‘Soft Law’ in D Armstrong (ed), *Handbook of International Law* (London, Routledge Press, 2008) 68; D Shelton (ed), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford, Oxford University Press, 2000).

<sup>2</sup> The expression ‘soft law’ seems to have been first used in an environmental law context, see, eg R-J Dupuy, ‘Declaratory Law and Programmatic Law: From Revolutionary Custom to “Soft Law”’, in Akkerman et al (eds), *Declarations on Principle: A Quest for Universal Peace* (Leyden, Martinus Nijhoff Publishers, 1977), 247. The notion is far from non-controversial, however, see, eg J d’Aspremont, ‘Softness in International Law: A Self-Serving Quest for New Legal Materials’ 19 *European Journal of International Law* (2008) 1075.

<sup>3</sup> See also J Klabbers, ‘Institutional Ambivalence by Design: Soft Organizations in International Law’ 70 *Nordic Journal of International Law* (2001) 403 ; D’Aspremont, n 2 above.

While most soft law instruments are limited to expressing substantive goals and principles, some soft law instruments purport to establish institutional frameworks. It is our conviction that, while 'soft organisations'<sup>4</sup> are difficult to classify according to a comprehensive and coherent terminology, as they dispel a variety of institutional features, ranging from organisations which come close to veritable intergovernmental organisations to less institutionalised forms of cooperation such as networks,<sup>5</sup> they cannot be ignored from a legal point of view.

To the extent that 'soft organisations' have come into being, it is most often in a regional and sub-regional context. A striking example of such cooperation at an all-European level is offered by the Organization for Security and Cooperation in Europe (hereinafter OSCE). The OSCE has undergone a gradual development from a series of conferences, including the signing, at the Conference for Security and Cooperation in Europe, of the Helsinki Final Act of 1975, to an institutional structure resembling, to say the least, that of an intergovernmental organisation.<sup>6</sup> This development was also recognised by the change of name, in 1994, from 'Conference' to 'Organization' (for Security and Cooperation in Europe), from CSCE to OSCE.<sup>7</sup> Despite these institutional and functional developments, the OSCE still operates on the assumption that it does not constitute a veritable intergovernmental organisation endowed with international legal personality. In the 1994 Budapest Document it is stated that the change in name from CSCE to OSCE 'alters neither the character of our CSCE commitments nor the status of the CSCE and its institutions', and that in its organisational development, 'the CSCE will remain flexible and dynamic'.<sup>8</sup> The political reluctance to accept the birth of a veritable intergovernmental organisation is also apparent from the official OSCE terminology insisting on the use of the notion of 'participating' States rather than member States.

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¥ <sup>4</sup> Klabbers, n 3 above; A Di Stasi, 'About Soft International Organizations: An Open Question' in R Virzo and I Ingravallo (eds), *Evolutions in the Law of International Organizations* (Leiden, Brill/Nijhoff, 2015) 44.

<sup>5</sup> See Klabbers, n 3 above, at 405-408.

<sup>6</sup> On OSCE activities and its institutional structure see, eg M Bothe, N Ronzitti and A Rosas (eds), *The OSCE in the Maintenance of Peace and Security: Conflict Prevention, Crisis Management and Peaceful Settlement of Disputes* (The Hague, Kluwer Law International, 1997).

<sup>7</sup> On the early days of the CSCE/OSCE see, eg A Bloed (ed), *The Conference on Security and Cooperation in Europe: Analysis and Basic Documents 1972-1993* (Dordrecht, Kluwer Academic Publishers, 1993).

<sup>8</sup> Chapter I, para 29, of the Budapest Decisions, constituting part of the CSCE Budapest Document 1994: Towards a Genuine Partnership in a New Era, Budapest 6 December 1994.

In the Northern European hemisphere, three institutional frameworks are particularly noteworthy, namely the Council of the Baltic Sea States (hereinafter CBSS), the Arctic Council and the Barents Council. This paper will focus on the CBSS, and above all its status, organisation, tasks and relevance, but seen in comparison with the Arctic and Barents Councils in particular, and within the broader context of Baltic Sea Area governance, particularly other institutionalised forms of cooperation in this Area. As will be elaborated below, the Baltic Sea region displays a particularly rich and multifaceted governance structure, with a blend of intergovernmental organisations, the CBSS, and transnational semi-public or semi-private entities and networks.

As to its two sister organisations in the North, the Arctic and Barents Councils they clearly display similarities, but also some differences, as compared to the CBSS. As a matter of fact, both the Arctic Council and the Barents Cooperation, which were also created after the end of the Cold War, are based on a soft-law form similar to that of the CBSS. We will not, on the other hand, focus on the Nordic Council and the Nordic Council of Ministers, despite the somewhat peculiar character of the birth and nature of the Nordic Council in particular (which is basically an assembly of representatives of national parliaments), as they have a geographically more limited remit than the Baltic Sea Area and are both organisations which since 1962 are based on a treaty (the Treaty of Helsinki) and are thus not typical 'soft organisations'.<sup>9</sup>

## **2. The Establishment and General Development of the CBSS**

The CBSS was established in March 1992, when the Ministers for Foreign Affairs of ten Baltic Sea States and a Representative of the European Commission met in Copenhagen to strengthen existing cooperation in the Baltic Sea Area. The CBSS was established by a ministerial declaration with a view to providing for an 'overall regional forum' for intensified cooperation and coordination.<sup>10</sup> This move is undoubtedly explained by the historical and cultural ties between the countries and regions of the Baltic Sea area and the geographical nature of the Baltic Sea as an inland sea. While some common cooperation arrangements

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<sup>9</sup> See n 71 below.

<sup>10</sup> 1992 CBSS 1<sup>st</sup> Ministerial Session- Copenhagen Declaration, Conference of Foreign Ministers of the Baltic Sea States, Copenhagen, March 5-6, 1992

between the Baltic Sea countries did exist already before 1992, the CBSS was intended to provide an overarching framework for coordination and cooperation in various fields.

The establishment of the CBSS should also be seen against the background of the important changes in the political landscape of Northern Europe that had occurred in the early 1990s, as manifested by the re-emergence of three independent Baltic States (Estonia, Latvia and Lithuania) and the dissolution of the Soviet Union in 1991.<sup>11</sup> According to the Declaration adopted by the Copenhagen Conference, the ‘Ministers agreed that the recent dramatic changes in Europe herald a new era of European relations’ and an enhanced Baltic cooperation was said to be a ‘natural and logical consequence of these events’.<sup>12</sup> Six areas of cooperation were listed, namely 1) assistance to new democratic institutions; 2) economic and technical assistance and cooperation; 3) humanitarian matters and health; 4) protection of the environment and energy 5) culture, education, tourism and information; and 6) transport and communication. One is struck by the broad range of activities thus outlined from the outset, something to which we shall come back in the ensuing discussion.

The decision to establish the CBSS was expressed in a Declaration adopted but not signed by the participants. This document thus did not take the ostensive form of a treaty (a binding international agreement) as governed by international treaty law<sup>13</sup> but appears to be an example of a ‘soft law’ instrument, in other words an instrument containing a political commitment to establish a regional cooperation network short of constituting an intergovernmental organisation endowed with a legally binding constituent instrument and what is usually referred to as ‘international legal personality’.<sup>14</sup> The ‘Terms of Reference for the Council of the Baltic Sea States’ attached to the Declaration did not change this picture.

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<sup>11</sup> S Hollis and M Ekengren, *Regional Organization Study: Council of the Baltic Sea States*, ANVIL – Analysis of Security Systems in Europe (July 2013) 5.

<sup>12</sup> See n 10 above.

<sup>13</sup> See the Vienna Convention on the Law of Treaties of 1969. It should be noted, however, that the borderline between binding treaties and instruments of a non-binding character is not clear-cut, see, eg A Aust, *Modern Treaty Law and Practice*, 2<sup>nd</sup> edn (Cambridge, Cambridge University Press, 2000) 17.

<sup>14</sup> International legal personality is possessed by an entity if it is capable of possessing international rights and duties and [has] the capacity to maintain its rights by bringing international claims, as defined by the ICJ in *Reparation for injuries suffered in the service of the United Nations*, *Advisory Opinion: I.C.J. Reports 1949*, 174

The participants at the Copenhagen Conference of 1992 clearly did not fathom the establishment of an intergovernmental organisation proper, as also borne out by some of the language used: 'regional forum', 'regional undertaking', and so on.<sup>15</sup> The particular nature of the exercise can also be seen from the fact that the 'European Commission' was registered as one of the participants despite the fact that the European Commission is not a subject of international law but an organ of what is today the European Union (hereinafter EU), the successor to the European Community as it existed in 1992.<sup>16</sup> The CBSS Terms of Reference of 1992 did refer, in fact, to the Commission as one of the 'members' of the Council.<sup>17</sup>

The Copenhagen Declaration, including the Terms of Reference attached to it, apart from establishing the CBSS as such, charged a 'Committee of Senior Officials' to consider ways to implement the ideas contained in the Declaration and also fixed the time and place of the following meeting of the CBSS. The Terms of Reference referred to a rotating Council Presidency and the Committee of Senior Officials (hereinafter the CSO) but provided, on the other hand, that the new Council 'should not be seen as a new formalized institutional framework with a permanent secretariat', it being understood that the secretariat services should be provided by the host country of each session of the Council.<sup>18</sup>

This quite modest germ of institutionalisation was later followed by further steps, including the establishment, in 1994, of the post of CBSS Commissioner on Democratic Institutions and

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<sup>15</sup> T Etzold, 'Reorganization Processes in Small International Organizations: The Nordic Council and the Council of the Baltic Sea States' in M W Bauer and C Knill (eds), *Management Reforms in International Organizations* (Baden-Baden, Nomos, 2007) 149 at 156. Cf A Krohn, 'The Council of the Baltic Sea States (CBSS): Fostering Cooperation in the Baltic Region', 43 *German Yearbook of International Law* (2000) 64 at 68, who notes that the 'cooperation model is of a traditional intergovernmental nature'. The author refers here to the fact that the CBSS constitutes a forum for cooperation between government representatives rather than an organisation with more far-reaching organs and powers and does not seem to argue that the CBSS constitutes an international organisation in the legal sense.

<sup>16</sup> The participation of the European Commission was not preceded by the formal procedure which governs the negotiation and conclusion, on behalf of the European Community/European Union, of international agreements. On the procedure for concluding international agreements see Article 218 of the Treaty on the Functioning of the European Union and A Rosas, 'Recent Case Law of the European Court of Justice relating to Article 218 TFEU' in J Czuczai and F Naert (eds), *The EU as a Global Actor: Bridging Legal Practice and Theory at the Turn of the 21<sup>st</sup> Century: Liber Amicorum Ricardo Gosalbo Bono* (Brill- Nijhoff, 2017).

<sup>17</sup> Terms of Reference for the Council of the Baltic Sea States (1992), para 4.

<sup>18</sup> Ibid para 3.

Human Rights,<sup>19</sup> revamped in 2000 to the post of Commissioner on Democratic Institutions (but terminated in 2003). Of more lasting importance was the decision, in 1998, to establish a permanent secretariat in Stockholm, despite the decision taken in 1992 *not* to establish a permanent secretariat. The establishment of the Stockholm secretariat, on the other hand, did not entail the creation of any large bureaucracy but constituted a rather modest step in an institutional sense. The original Terms of Reference of the CBSS were revised in 2005 and 2009.<sup>20</sup>

Today, as will be explained in greater detail below, the CBSS displays a fairly developed institutional structure which may remind us of that to be found in some intergovernmental organisations. Also its membership has changed, with Iceland joining as a member in 1995, and several non-Baltic Sea States allowed to participate in its work as observers. It should also be underlined that after its creation, in 1992, six of its Member States have become Member States of the EU (Finland and Sweden in 1995, Estonia, Latvia, Lithuania and Poland in 2004). What has not changed, however, is that the founding instruments are of a soft law nature, that decisions are taken by consensus and that they, legally speaking, seem to constitute recommendations rather than legally binding decisions (although already the Terms of Reference of 1992 referred to '[d]ecisions' of the Council and its subsidiary bodies'<sup>21</sup>). Moreover, the size of the permanent secretariat has remained limited (with an overall personnel today of around 25), which indicates that the possibilities of the CBSS to be responsible for activities of an operational nature remain limited.

Probably as a combined effect of the greatly increased presence of the EU in the Baltic Sea Area, with all Member States of the CBSS except Russia being either EU Members or States closely associated with the EU, the tensions which have been discernible in recent years

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<sup>19</sup> The full title was Commissioner of the Baltic Sea States on Democratic Institutions and Human Rights, Including the Rights of Persons Belonging to Minorities. See M Niemivuo, 'What Could the Arctic Council Learn from the Council of Baltic Sea States in Promoting Arctic Governance?' 4 *The Yearbook of Polar Law* Online, Issue 1, (2012), 39.

<sup>20</sup> See Terms of Reference adopted by the 1st CBSS Ministerial Session in Copenhagen in March 1992, revised by the 13th CBSS Ministerial Session in Szczecin in June 2005, revised by the Council through written procedure in April 2009 (hereinafter Revised Terms of Reference of 2009).

<sup>21</sup> Terms of Reference of 1992, para 13. The Revised Terms of Reference of 2009 refer to '[d]ecisions within the CBSS', para 22.

between the EU and Russia, as well as the modest resources and powers of the CBSS as compared to the EU in particular, doubts have been expressed as to the continuing relevance and *raison d'être* of the CBSS.

After the accession of the three Baltic States and Poland to the EU, the relevance of the CBSS was nevertheless reaffirmed, *inter alia*, in the Northern Dimension Policy framework as renewed in Helsinki in 2006. Apart from the Northern Dimensions 'partners', which are the EU, Iceland, Norway and Russia, four regional councils, that is, the Barents Euro-Arctic Council, the CBSS, the Nordic Council of Ministers and the Arctic Council, are listed as 'other participants' (category A).<sup>22</sup>

To mention a more recent example, in June 2016, a CBSS meeting of deputy foreign ministers met in Warsaw and reaffirmed the 'core role of the CBSS as a forum for all multilateral intergovernmental cooperation and dialogue in the Baltic Sea Region'.<sup>23</sup> And in the Declaration on the Occasion of the 25<sup>th</sup> Anniversary of the CBSS (Reykjavik, 20 June 2017), the Foreign Ministers and high-level representatives 'agreed on the need to maintain and strengthen the role of the CBSS towards 2020 and beyond'. They also invited the CBSS to appoint 'an independent group of wise persons, including from civil society'. The task of the group, which is about to commence its work at the end of 2017, is to elaborate a report with recommendations 'for a vision for the Baltic Sea Region beyond 2020 and on the future role of the CBSS and the means to expand its impact as a forum for political dialogue and practical cooperation in the region'. The report with recommendation should be presented before the end of the Swedish CBSS Presidency 2017-2018.

In this context, a brief word is in order on the birth of the two sister organisations of the CBSS, the Arctic and Barents Councils. The predecessor to the Arctic Council – the Arctic Environmental Protection Strategy, also called the Rovaniemi process<sup>24</sup> – was a Finnish

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<sup>22</sup> See the Political Declaration on the Northern Dimension Policy and the Northern Dimension Policy Framework Document, adopted in Helsinki on 24 November 2006 (the Framework Document became effective as of 1 January 2007).

<sup>23</sup> Warsaw Declaration: Regional Responses to Global Challenges, Meeting of Deputy Foreign Ministers of the Council of the Baltic Sea States, Warsaw, 8 June 2016.

<sup>24</sup> The Arctic Environmental Protection Strategy (AEPS) was created at the first ministerial conference in Rovaniemi, Finland in June 1991, in the Declaration on the Protection of Arctic Environment.



initiative and it was merged with the Canada- initiated Arctic Council during 1996 to 1998. The member states are the eight Arctic states (five Nordic states, the Russian Federation, the United States and Canada). A unique feature is that indigenous peoples' organisations have a status as permanent participants in this intergovernmental forum, which was established via a declaration rather than a treaty.<sup>25</sup>

Barents co-operation advances sustainable development in the region and functions at two levels: the Barents Euro-Arctic Council (hereinafter BEAC) that operates on the level of governments (Finland, Iceland, Norway, Russia, Sweden and the European Union) and the Barents Regional Council that promotes county level co-operation between the northernmost provinces in Finland, Sweden, Norway and North-West of Russia. Indigenous peoples organisations, those representing the Sámi, the Nenets and the Vepsians, cooperate in the Working Group of Indigenous Peoples (WGIP), which has an advisory role at both levels of co-operation.<sup>26</sup>

### **3. CBSS: Membership and Participation**

In the preceding section, we already indicated how the CBSS came into being as well as its main purpose and original institutional setup.<sup>27</sup> It is now time to consider in some greater detail, first, its membership and who can participate in its activities (this section), second, its institutional structure and areas of activity (section 4) and, third, its institutional and legal status as a 'soft organisation' situated somewhere in-between intergovernmental organisations proper, on the one hand, and ad hoc meetings and conferences, on the other (section 5). In a final section we shall discuss current and probable future developments and challenges, including presenting some recommendations in this respect. The main focus will be on the CBSS, but comparisons are made also with the Arctic Council and Barents co-operation, the BEAC in particular.

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<sup>25</sup> Ottawa Declaration on the Establishment of the Arctic Council, September 1996, signed by the representatives of the eight Arctic States. Paragraph 1 refers to the establishment of the Arctic Council as a high level forum. Paragraph 2 lists indigenous peoples organisations as permanent participants. Para 5 of the Arctic Council Rules of Procedure provides that the category of Permanent Participation is created to provide for active participation and full consultation with the Arctic indigenous representatives within the Arctic Council. On the Arctic Council in general see also W Hasanat, *Soft-Law Cooperation in International Law: The Arctic Council's Efforts to Address Climate Change* (Rovaniemi, Lapland University Press, 2012).

<sup>19</sup> Established on a permanent basis by the Regional Council in 1995.

<sup>27</sup> See also Niemivuo, n 19 above, 39

As to membership, the CBSS, as noted in the introductory section, was established by ten Baltic Sea States and the European Commission. From the beginning, the concept of Baltic Sea State was considered to encompass Norway. After Iceland was admitted to join the organisation as a member in 1995, the CBSS has had twelve members, including the European Commission (more recently, the reference to the 'European Commission' has been replaced by 'European Union').

It is remarkable that in the CBSS context, the notions of 'Member' and 'Member States' does not seem to have been a controversial issue, whereas, as noted in section 2, the official OSCE language refers to 'participating States', to avoid the impression of a veritable intergovernmental organisation. On the other hand, it was the 'European Commission' and not the EU which was initially listed as a 'Member' of the CBSS, which may suggest a somewhat flexible approach to the notion of 'Member' (the Commission not being a subject of international law but one of the institutions (organs) of the EU<sup>28</sup>).

In a similar vein, it was initially the European Commission that was listed as a member of the BEAC, together with Denmark, Finland, Iceland, Norway, Russia and Sweden. Today, the references to the European Commission should be read as meaning the European Union.<sup>29</sup> The EU, not the European Commission, has applied for the status of observer from the Arctic Council but at the time of writing, the decision on this is yet to be made. As already mentioned above, it is today the 'European Union' rather than the Commission which is registered as a Member of the CBSS. This change took place as part of the implementation of Article 1(4) of the Treaty on European Union (as modified by the Treaty of Lisbon, which entered into force on 1 December 2009), according to which the Union 'shall replace and succeed the European Community'.

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<sup>28</sup> See Articles 13 and 17 of the Treaty on European Union. See also Article 47 of the Treaty on European Union and Articles 216 and 335 of the Treaty on the Functioning of the European Union.

<sup>29</sup> For instance, the Joint Declaration emanating from the XVI session of the BEAC in Arkhangelsk, 18-19 October 2017, refers to the 'European Union' whereas the website of the BEAC continues to mention the 'European Commission' as one of the Members.

With respect to the EU, it should also be recalled that while in 1992, only two of the members were Member States of the EU (Denmark and Germany), today all members of the CBSS except Iceland, Norway and Russia are at the same time Member States of the EU. Moreover, Iceland and Norway are parties to the agreement on the European Economic Area (EEA), which implies participation in the EU internal market and also in other respects close ties to the EU. Given this overlapping between CBSS members, on the one hand, and EU and EEA members, on the other, it is understandable that the EU participates in CBSS activities and that the CBSS is able to draw upon EU policies and programmes, including in the framework of the EU Strategy for the Baltic Sea Region (EUSBSR).<sup>30</sup> The strong EU component in the membership of the CBSS has on the other hand underlined the unique position of Russia as the only clearly non-EU Member (although, as was noted above, the same constellation is apparent in the BEAC and the Northern Dimension framework).

Membership in the CBSS involves full participation in all its decision-making bodies, including the power to block a consensus on measures proposed. With the exception of the European Union, members also assume, on a yearly rotating basis, the function as Presidency. Member States are represented in the Council by their Minister of Foreign Affairs and the EU by a member of the Commission.<sup>31</sup> The same rotation is used in the Arctic Council and the BEAC, with the difference that the chair country will serve two years, rather than one year (the EU does not assume chairmanship in the BEAC and only Norway, Finland, Russia and Sweden can be chairs). Chairmanship is transferred in biennial ministerial meetings, in which foreign ministers represent their countries.

In the CBSS, the CSO consists of 'senior foreign affairs officials' representing the Member States and the EU; the Committee is chaired by a senior representative of the CBSS Presidency.<sup>32</sup> The same model is used both in the Arctic Council and the BEAC. In the Arctic

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<sup>30</sup> S Gänzle, 'The European Union's Strategy for the Baltic Sea Region (EUSBSR): Improving Multilevel Governance in Baltic Sea Cooperation?' *Journal of Baltic Studies* 2017, published online 27 April 2017, <http://dx.doi.org/10.108/01629778.2017.1305205>.

<sup>31</sup> Revised Terms of Reference of 2009, n 20 above, para 3.

<sup>32</sup> Ibid, para 14.

Council, it is the foreign ministry officials that serve as members (Senior Arctic Officials, SAO's) whereas in the BEAC it is civil servants from various ministries (Committee of Senior Officials).

The CBSS may also admit other than the 11 Member States as observers.<sup>33</sup> At the time of writing, there are 11 Observer States (including countries such as France, Italy, the United Kingdom and the United States), the latest newcomer being Hungary.<sup>34</sup> It is for the Council (at ministerial level) to decide on the acceptance of new Observers.<sup>35</sup> Observers may be given the right to speak but they do not participate in decision-making.<sup>36</sup> Since 2002, the Observer States are invited on an annual basis to a CSO meeting at which they inform the CSO about their activities (both planned and completed) in the CBSS framework in particular and in the Baltic Sea Region in general.

The observers of BEAC are Canada, France, Germany, Italy, Japan, the Netherlands, Poland, United Kingdom and the United States of America, and the issue has not caused the same attention as in the Arctic Council. During 2007-2011 there were intense discussions in the Arctic Council on what the criteria for new observers would need to be since many major nations and the EU wanted to become observers, which caused concern among small indigenous peoples organisations that have a special status in the co-operation as its permanent participants. At the Nuuk and Kiruna ministerial meetings, the Council was able to accept criteria by which observer candidates are evaluated and what their rights and obligations are.<sup>37</sup> After the adoption of these rules, it was possible to admit new observers.

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<sup>33</sup> Ibid, para 4; Principles and Guidelines for Third Party Participation in CBSS Activities and Meetings, adopted by the Ministers for Foreign Affairs of the CBSS Member States through written procedure in February 1999, revised by the Council through written procedure in April 2009.

<sup>34</sup> Hungary was approved as an Observer at the Meeting of Deputy Foreign Ministers in Warsaw on 8 June 2016, see, eg CBSS, *Annual Report of the Polish Presidency 2015-2016*, 8.

<sup>35</sup> Principles and Guidelines, n 33 above, para III:3.

<sup>36</sup> Ibid, para III:2.

<sup>37</sup> Para 6, Annex 2 to the Arctic Council Rules of Procedure lists the Criteria for Admitting Observers: In the determination of the general suitability of an applicant for Observer status, the Arctic Council will take into account the extent to which the applicant: a. accepts and supports the objectives of the Arctic Council defined in the Ottawa Declaration; b. recognizes Arctic States' sovereignty, sovereign rights and jurisdiction in the Arctic; c. recognizes that an extensive legal framework applies to the Arctic Ocean including, notably, the Law of the Sea, and that this framework provides a solid foundation for responsible management of this Ocean; d. respects the values, interests, culture and traditions of Arctic indigenous peoples and other Arctic inhabitants; e. has demonstrated a political willingness as well as financial ability to contribute to the work of the Permanent Participants and other Arctic indigenous peoples; f. has demonstrated their Arctic interests and expertise

Currently, there are 13 country observers: five states from Asia, including China, India, Japan, South Korea and Singapore and eight states from Europe. Altogether there are almost 40 observers and new applications are being drawn.<sup>38</sup>

While in the CBSS, the observer status is reserved for third States, some organisations may apply for the status of Strategic Partner (with a status similar to that of an Observer).<sup>39</sup> There are at the time of writing seventeen such Partners, including intergovernmental organisations and bodies, namely the Baltic Marine Environment Protection Commission (HELCOM),<sup>40</sup> the International Organization for Migration (IOM) and the Organisation for Economic Co-operation and Development (OECD). Strategic Partners also include some cooperation networks between parliaments (the Baltic Sea Parliamentary Conference (BSPC)), subregions (Baltic Sea States Subregional Cooperation (BSSC) and Baltic Sea Commission (BSC) within the Conference of Peripheral Maritime Regions (CPMR)), islands (B7 Baltic Seven Islands) and

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relevant to the work of the Arctic Council; and g. has demonstrated a concrete interest and ability to support the work of the Arctic Council, including through partnerships with member states and Permanent Participants bringing Arctic concerns to global decision-making bodies.

<sup>38</sup> According to Paragraph 3 of the Ottawa Declaration 1996, Observer status in the Arctic Council is open to a. Non-Arctic states; b. inter-governmental and inter-parliamentary organisations, global and regional; and c. non-governmental organisations. Currently there are thirteen non-Arctic State observers, thirteen intergovernmental and inter-parliamentary organisations and thirteen non-governmental organisations as Observers. Examples of recently added Observers (other than States) include International Council for the Exploration of the Sea (ICES) (Fairbanks Ministerial meeting, 2017); OSPAR Commission (Fairbanks Ministerial meeting, 2017); World Meteorological Organization (WMO) (Fairbanks Ministerial meeting, 2017); National Geographic Society (NGS) (Fairbanks Ministerial meeting, 2017), Oceana (Fairbanks Ministerial meeting, 2017). Role of Observers as laid out in Part V: Observers in the Arctic Council Rules of Procedure. Once observer status has been granted, Observers shall be invited to the meetings and other activities of the Arctic Council unless SAOs decide otherwise. Observer status shall continue for such time as consensus exists among Ministers. The primary role of Observers is to observe the work of the Arctic Council. Observers contribute through their engagement in the Arctic Council primarily at the level of working groups. In meetings of the Arctic Council's subsidiary bodies to which Observers have been invited to participate, Observers may, at the discretion of the Chair, make statements after Arctic States and Permanent Participants, present written statements, submit relevant documents and provide views on the issues under discussion. Observers may also submit written statements at Ministerial meetings. Observers may propose projects through an Arctic State or a Permanent Participant but the total financial contribution from all Observers to any given project may not exceed the financing from Arctic States, unless otherwise decided by the SAOs.

<sup>39</sup> See Principles and Guidelines for Third Party Participation in CBSS Activities and Meetings, n 33 above, para II. Para II:1 states that 'third party states may apply for, in the case of states, the status of Observer, or in the case of organisations, the status of Strategic Partner'.

<sup>40</sup> HELCOM functions as the governing body of the Convention on the Protection of the Marine Environment of the Baltic Sea Area (the Helsinki Convention). See also at n 71 below.

cities (the Union of Baltic cities (UBC)). Finally, some university (such as the Baltic University Programme) and non-governmental (such as the Baltic Sea NGO Network) fora and networks have been admitted as Strategic Partners. New Strategic Partners may be accepted by the CSO.<sup>41</sup>

The CBSS has also taken the initiative to organise annual coordination meetings (organised and presided over by the CSO Chair) with the participation of Baltic Sea regional organisations providing a more structured channel for involving the strategic partners to voice their concerns and coordinate their efforts with the CBSS and other organisations. It has also partnerships and cooperation with other regions, entities and other regional strategies, for example: EUSBSR (EU Strategy for the Baltic Sea Region), EUSBSR Horizontal Action Neighbours, EUSBSR Horizontal Action Climate and EUSBSR Policy Area Secure.

In addition, third parties without the status of Observer or Strategic Partner may be invited to participate in CBSS activities. More specifically, such third parties may be invited to take part in meetings at all levels for one or more agenda points or for the entire meeting. As is the case for Observers and Strategic Partners, they may be given the right to speak but they do not take part in decision-making.<sup>42</sup> If they would wish to participate in CBSS activities and projects on a more continuous basis they are expected to submit an application for the status of Observer or Strategic Partner, respectively.<sup>43</sup> A similar type of arrangement is to be found in the BEAC, where the Council and its working bodies 'may decide to invite special participants, guests or observers to contribute to its work. This may include representatives of regions, subregions and international organizations'<sup>44</sup>. The Arctic Council has a provision for inviting Observers, additional permanent participants,<sup>45</sup> and experts. An expert is a person or organisation that can contribute expertise to a working group, task force or other

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<sup>41</sup> Principles and Guidelines, nn 33 and 39 above, para III:3.

<sup>42</sup> Ibid, para III:2.

<sup>43</sup> Ibid, para III:3.

<sup>44</sup> Terms of Reference for the Council of the Barents Euro-Arctic Region, para 11.

<sup>45</sup> Arctic Council Rules of Procedure, paras 34,35, Additional Permanent Participants paras 36-38 on Observers; paras 39-40 on Experts.

subsidiary body. These persons or organisations do not have Observer status unless so decided in accordance with the Rules of Procedure of the Arctic Council.

#### **4. CBSS: Organs and Areas of Activity**

The presidency of the CBSS rotates between the eleven Member States on an annual basis. Each Presidency lays down a set of specific priorities to guide the works of the Council for the Presidency year.<sup>46</sup> The CSO consists of high ranking representatives of the Ministries of Foreign Affairs of the 11 CBSS Member States as well as of the European Union and serves as the main discussion forum and decision making body for matters related to the work of the Council between Ministerial Sessions. The CSO monitors, facilitates and aims to coordinate the work of all CBSS structures. The period chaired by each country rotates on an annual basis and follows the Council Presidency. There are several expert groups and task forces under the guidance of the CSO<sup>47</sup> and it coordinates the work undertaken in the agreed three long-term priorities. In this context it should also be mentioned that according to the CBSS revised Terms of Reference, the CBSS ‘takes overall political guidance’ from the Baltic Sea States Summits, which gather the Heads of Government and the President of the European Commission. The last Summit was organised in Stralsund in May 2012.<sup>48</sup>

The Permanent International Secretariat was established following the 7th CBSS Ministerial Session in Nyborg, Denmark in 1998 and is located in Stockholm. Its mandate, as laid down in the Terms of Reference of the Secretariat, adopted in 2004 and revised in 2009,<sup>49</sup> is, inter alia, to provide technical, organisational and analytical support to the CBSS Chairman and the

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<sup>46</sup> As an example, the 2016-17 Presidency was held by Iceland. Its priorities included children, equality and democracy, respect for human rights, gender equality (Goal 5 of the 2030 UN Agenda for Sustainable Development); rights of the child, special focus on asylum-seeking children and unaccompanied children, preventing abuse and trafficking of children through cooperation among different authorities and across sectors.

<sup>47</sup> Expert Groups and Task Forces: Expert Group on Youth Affairs (EGYA); Expert Group on Maritime Policy (EGMP); Expert Group on Children at Risk; Expert Group on Nuclear and Radiation Safety; Task Force against Trafficking in Human Beings; Task Force on Organized Crime.

<sup>48</sup> CBSS, German Presidency 2011-2012, 9<sup>th</sup> Baltic Sea States Summit, Stralsund, Germany, 31 May 2012.

<sup>49</sup> Terms of Reference of the Secretariat of the Council of the Baltic Sea States, adopted by the CBSS Ministers’ Deputies at their meeting in Laulasmaa, Estonia on 21 June 2004, revised by the Council through written procedure in April 2009.

structures and working bodies of the Council.<sup>50</sup> The Secretariat is headed by a Director General, who is appointed by the Members of the Council by consensus.<sup>51</sup> Overall, there are about 25 personnel, including trainee assistants and administrative personnel.<sup>52</sup> The Member States (but not the EU, which may be involved in other types of funding) contribute to the budget of the Secretariat according to an established scale while the host country (Sweden) provides the premises of the Secretariat free of charge. According to the Terms of Reference, the Secretariat shall have such legal capacity as is necessary for the exercise of its functions; its privileges and immunities are set out in a Host Country Agreement concluded in 1998 between Sweden and the Secretariat.<sup>53</sup> This part of the Terms of Reference as well as the Host Country Agreement will be further discussed in section 5 below.

The activities of the CBSS are spread across a broad range, from youth and intercultural dialogue to entrepreneurial and creative industry collaborations, creation of labour markets, research and innovation and scientific cooperation, climate change mitigation and adaptation policy coordination, spatial planning, sector specific collaborations for instance in the maritime and energy sectors, supporting pilot financial initiatives, law enforcement cooperation, critical infrastructure protection and emergency preparedness, child protection and prevention of human trafficking.<sup>54</sup>

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<sup>50</sup> The Secretariat also performs many other tasks: to ensure continuity and enhanced coordination of CBSS activities; to implement the CBSS Information and Communication Strategy; to maintain the CBSS archives and information database; to maintain contacts with other organisations operating in and around the Baltic Sea region, the national authorities of Member States and the media. There are also specialised units that are integrated into the Secretariat: the Baltic 21 Unit (servicing the Baltic 21 Network), Children's Unit (servicing the Expert Group for Cooperation on Children at Risk) and the Task-Force against Trafficking on Human Beings.

<sup>51</sup> At the time of writing, Ambassador Maira Mora (Latvia).

<sup>52</sup> CBSS *Annual Report of the Polish Presidency 2015-2016* (CBSS 2916) 98.

<sup>53</sup> Agreement between the Government of the Kingdom of Sweden and the Secretariat of the Council of the Baltic Sea States on the Privileges and Immunities of the Secretariat, published in Sveriges internationella överenskommelser, SÖ 1999:14.

<sup>54</sup> The activities fall under the three long-term priorities of the Council of Baltic Sea States: regional identity, sustainable and prosperous region, safe and secure region as per the 20 June 2014 Decision by the Council of the Baltic Sea States on a review of the CBSS long term priorities.



It should be recalled that in the early days of its activities, the Council (in 1994) established the post of Commissioner on Democratic Institutions and Human Rights, later to become the Commissioner on Democratic Institutions. This should be seen in the context of the perceived need to assist the Baltic Sea countries previously being part of the Soviet Union (Estonia, Latvia, Lithuania and Russia) or closely allied with it (Poland) to strengthen their democratic institutions and the respect for the rule of law and human rights. This post was abolished in 2003, arguably because the need for such an institution was perceived to have diminished because of the upcoming EU membership of the three Baltic countries and Poland, coupled with the political difficulties in pursuing democracy, rule of law and human rights monitoring with respect to Russia alone. The human rights-related work of the CBSS has subsequently focused on specific questions such as children at risk and trafficking of human beings, which in the present political climate (tensions between Russia and the other members, in particular) appear less controversial than a general focus on democracy, the rule of law and human rights.

The Project Support Facility (PFS) was created to co-finance the development and implementation of the Baltic Sea Region cooperation projects contributing to CBSS long-term priorities, which are today *regional identity, sustainable and prosperous region* and *safe and secure region*. Each of these contains multiple activities.<sup>55</sup> In the 2017 Reykjavik Declaration

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<sup>55</sup> Ibid, n.63; Specific activities and programmes under the priorities: Balticlub- joint partnership between the CBSS and the Swedish Institute, also a flagship project under Priority Area Culture of the European Strategy for the Baltic Sea Region; Baltic Sea Youth Dialogue: to help young Europeans transcend national frontiers, an opportunity for intercultural dialogue in the Baltic Sea Region; CBSS Summer University (report to the Ministers of Culture of the BSR through the CBSS Group of Senior Officials on Culture); Intergovernmental Cultural Cooperation; Baltic Sea Labour Forum (BSLF): the only cooperation body where trade union, employer organisation parliament and governmental organisation representatives work together to create sustainable regional labour markets within the Baltic Sea Region; Baltic TRAM (Transnational Research Access in the Macroregion); Baltic Science Network; BASREC (Baltic Sea Region Energy Cooperation); Sustainable Development- Baltic 2030; Pilot Financial Initiative (PFI): open platform for financial cooperation to finance innovative small and medium businesses as well as PPP projects to upgrade social, municipal and regional infrastructure, energy efficiency, nature protection in the geographic area of CBSS; VASAB: intergovernmental multilateral cooperation in spatial planning and development between the 11 countries of the Baltic Sea Region guided by the Conference of Ministers responsible for spatial planning and development; Safe and Secure Region, e.g. Civil Protection Network; Border Control Cooperation (Baltic Sea Region Border Control Cooperation or BSRBCC; Civil Protection Network (CPN): cooperation between national rescue and crisis management authorities; Capacity-building through linking existing expertise with international practices; Task Force on

(see section 2 above), the organisation is invited to identify and launch new project activities within the following areas: sustainable development, youth, human trafficking,, child protection and civil protection. The CBSS is currently preparing its long term strategy, to implement the UN Agenda 2030 in its region.<sup>56</sup> Moreover, the report of the independent group of wise persons to be presented in 2018 (see section 2 above) may contain further recommendations as to new areas to be covered – or, rather, as the case may be, existing areas of activities to be dropped or streamlined.

The structure of the CBSS is strikingly similar to that of the Arctic Council, even if the chair period of a country lasts longer in the Arctic Council than in the CBSS, that is, two years. During the two year chairmanship it is the meetings of the Senior Arctic Officials from the foreign ministries that co-ordinate the work in the Arctic Council, led by the chair state. Also an Arctic Council permanent secretariat was established that commenced its work in 2013 in Tromsø, Norway. The Council has six working-groups, a varying number of task-forces and expert groups. Currently, the Arctic Council is exploring the possibility to introduce long-term strategic planning to guide its activities.<sup>57</sup>

The BEAC also functions very much in the same way as the CBSS and the Arctic Council. The main co-ordination is done in the CSO, which consists of civil servants representing the governments of the six member countries and the EU. This body meets on a regular basis four

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Organized Crime; Prosecutors General: for prosecution-related issues such as mutual legal assistance and extradition in criminal matters, trafficking in human beings and environmental crime in the Baltic Sea Region; Network of Prosecutors on Environmental Crime (ENPRO).

<sup>56</sup> See CBSS, Icelandic Presidency 2016-2017, *Realizing the Vision: The Baltic 230 Action Plan*, 20 June 2017. The Baltic Sea cooperation on sustainable development goes back to 1996 when the Prime Ministers of the CBSS countries initiated the 'Agenda 21 for the Baltic Sea Region -Baltic 21', as a regional expression of the global Agenda 21 adopted by the United Nations Earth Summit. The Baltic 21 Action Programme was adopted by the Ministers of Foreign Affairs in 1998 and on 1 January 2010 Baltic 21 was integrated into the CBSS as an Expert Group on Sustainable Development – Baltic 21. On 6 June 2016, high level representatives of the CBSS countries reaffirmed their commitment to jointly realize the vision of sustainable development in the Baltic Sea Region, in alignment with the 2030 Agenda and decided to elaborate an Action Plan. <http://www.cbss.org/sustainable-prosperous-region/egsd-baltic-2030-2/>

<sup>57</sup> T Koivurova and M Śmieszek, 'The Arctic Council: Between Continuity and Change,' in PW Lackenbauer, H Nicol and W Greaves (eds) *One Arctic: The Arctic Council and Circumpolar Governance* (Ottawa, Canadian Arctic Resources Committee / Centre on Foreign Policy and Federalism, forthcoming 2017, 1).

to five times per year and most often in the country holding the chairmanship. The Working Groups – there are two in the BEAC (and one steering committee)<sup>58</sup> - report to the CSO each year. The CSO provides guidance to the groups, and it also has the mandate to establish new Working Groups or terminate groups that have completed their tasks. BEAC Foreign Ministers' Sessions take place bi-annually, like in the Arctic Council. Interestingly, over the past years, Prime Ministers, Ministers of Environment, Transport, Culture, and Competitiveness have met to discuss topical issues in the Barents Region, thus feeding into Barents regional co-operation.

## **5. CBSS: Institutional and Legal Status**

As pointed out above, the CBSS, the Arctic Council and the BEAC are similar in many respects. All of these regional bodies of intergovernmental cooperation have been founded by political, arguably non-binding declarations rather than international treaties. The CBSS was established in March 1992 in Copenhagen via a ministerial declaration, as was the Arctic Council in 1996 in Ottawa Canada (as was its predecessor the Rovaniemi process, which was established via the Rovaniemi declaration) and Barents co-operation via the Kirkenes declaration in Norway in 1993.

It is interesting to note that of these organisations, two, and the Arctic Council in particular, have been able to catalyse legally binding agreements between the member states. Under the auspices of the BEAC, in 2008, the parties negotiated an agreement between the governments in the Barents Euroarctic region on cooperation within the field of emergency prevention, preparedness and response.<sup>59</sup> In the Arctic Council, already three legally binding agreements have been negotiated under the auspices of the Arctic Council between the eight member states of the Council: the Agreement on Cooperation on Aeronautical and Maritime

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<sup>58</sup> These are Working Group on Economic Cooperation (WGEC; with the inclusion of Barents Forest Sector Network), Working Group on Environment (WGE) and the Steering Committee for the Barents Euro-Arctic Pan-European Transport Area (BEATA).

<sup>59</sup> This has been ratified by Sweden, Norway, Russia and Finland (<http://www.barentscooperation.org/news/Agreement-on-rescue-cooperation-fully-ratified/akdg5uub/915a490d-a004-4708-8d05-b9707b2012a0>).

Search and Rescue in the Arctic was signed in 2011,<sup>60</sup> the Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic in 2013<sup>61</sup> and the Agreement on Enhancing International Arctic Scientific Cooperation was signed at the Fairbanks ministerial meeting in May 2017.<sup>62</sup>

Even if the CBSS and its sister organisations should be seen as regional intergovernmental forums based on soft law, hard law has played some role in regulating the legal status of their secretariats and personnel. An example is the Agreement of 2007 between some Nordic countries and Russia on the establishment of an International Barents Secretariat to provide technical support for the regional activities within the framework of the BEAC and the Barents Regional Council.<sup>63</sup> According to Articles 2 and 3 of the Agreement, the Secretariat shall, on Norwegian territory, possess legal personality and enjoy some privileges and immunities.<sup>64</sup> As to the Arctic Council, there is a host country agreement between the Government of the Kingdom of Norway and the Arctic Council Secretariat on the legal status of the Secretariat

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<sup>60</sup> Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic, signed at the 7<sup>th</sup> Arctic Council Ministerial Meeting in Nuuk, Greenland, 2011; According to the Status of ratification of Agreements negotiated under the auspices of the Arctic Council as of 25 February 2016: the requirement of receipt by the depositary of the last written notification through diplomatic channels that Parties have completed the internal procedures required for its entry into force was met and the Agreement had come into force by the date of the Kiruna Ministerial Meeting in 2013.

<sup>61</sup> Agreement on Cooperation on marine oil pollution preparedness and response in the Arctic, signed at the 8<sup>th</sup> Arctic Council Ministerial meeting in Kiruna, Sweden, 2013; According to the Status of ratification of Agreements negotiated under the auspices of the Arctic Council as of 25 February 2016: Norway, as Depositary of the Agreement informed the Arctic Council Secretariat of the notification by all eight states.

<sup>62</sup> Agreement on Enhancing International Arctic Scientific Cooperation, signed at the Fairbanks Ministerial meeting, 11 May 2017 (<https://oaarchive.arctic-council.org/handle/11374/1916>)

<sup>63</sup> Agreement between the Government of the Republic of Finland, the Government of the Kingdom of Norway, the Government of the Russian Federation and the Government of the Kingdom of Sweden on the Establishment of an International Secretariat for the Co-operation in the Barents Euro-Arctic Region, published eg in the Finnish Treaty Series ('Sopimussarja') No 118/2007, 970.

<sup>64</sup> Article 2 of the Agreement states further that the Secretariat shall have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes, including the capacity to contract, to acquire, hold and dispose of movable and immovable property and to institute and participate in legal proceedings. Article 3 states that the Secretariat and its property and assets, permanent members of the Secretariat shall enjoy on the territory of Norway such privileges and immunities as are necessary for the exercise of its functions. The article also states the need of conclusion for a separate agreement with regard to the legal capacity and privileges and immunities of the Secretariat, its permanent staff members between the Secretariat and the Host State.

and the privileges and immunities of the Secretariat and its staff members.<sup>65</sup> It also contains provisions on the applicable law,<sup>66</sup> negotiation as the mechanism of dispute settlement, provisions concerning entry into force, amendments and termination of the Agreement, and thus, bears the hallmarks of a legally binding international treaty.

The Permanent International Secretariat of the CBSS was not founded by a legally binding treaty, but was established via a decision taken at the 7th Ministerial Session of the CBSS in 1998 in Nyborg, Denmark and started its operations from Stockholm on 20 October 1998. As noted above, according to its Terms of Reference, adopted in 1994 and revised in 2009,<sup>67</sup> the Secretariat shall have such legal capacity as is necessary for the exercise of its functions. It enjoys privileges and immunities, as set out in a Host Country Agreement concluded in 1998 between Sweden and the Secretariat.<sup>68</sup>

This Agreement has all the hallmarks of a legally binding international treaty. Apart from provisions on legal capacity and on the immunity of the Secretariat and of its officials, there is, *inter alia*, a provision on the settlement of disputes through arbitration<sup>69</sup> as well as final provisions concerning amendments, termination and entry into force. It is remarkable that the Agreement has been concluded by Sweden with the CBSS Secretariat rather than with the CBSS as such, or the Member States of the CBSS (as noted above, also the Arctic Council host agreement has been concluded between the Secretariat and the host country (in this case Norway)). By accepting the Secretariat as a Contracting Party, Sweden thus seems to have

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<sup>65</sup> Article 2, Legal Capacity of the Secretariat: The Secretariat has legal personality and capacity to perform its functions in Norway. It has in particular, the capacity to contract, to acquire and dispose of movable and immovable property, and to institute and be a party to legal proceedings. Article 6, Immunity of the Secretariat: two exceptions listed; Article 7, Objective and waiver of privileges and immunities. Paragraph 7(2) states that Director has the right and duty to waive the immunity in certain cases. The privileges and immunities of the Director and that of the Secretariat can only be waived by the Arctic Council Senior Arctic Officials. Article 14 contains provisions on immunity for staff members.

<sup>66</sup> Article 18 Norwegian law: Without prejudice to their privileges and immunities, the Secretariat and all persons enjoying privileges and immunities under this Agreement shall respect the laws and regulations of Norway.

<sup>67</sup> See at n 49 above.

<sup>68</sup> Agreement between the Government of the Kingdom of Sweden and the Secretariat of the Council of the Baltic Sea States on the Privileges and Immunities of the Secretariat, n 53 above.

<sup>69</sup> According to Article 13 of the Agreement, any dispute between the Secretariat and the Government of Sweden which cannot be settled amicably shall be referred for 'final decision' to a panel of three arbitrators. Should the arbitrators chosen by the two parties fail to agree upon the third arbitrator, the latter may be appointed by the President of the International Court of Justice.

accepted a limited international legal capacity for the Secretariat, including not only capacity to enter into private law relations (to contract, to acquire and dispose of movable and immovable property and to institute and participate in legal proceedings)<sup>70</sup> but also privileges and immunities akin to diplomatic privileges and immunities.

Apart from the Host Agreement just mentioned, the CBSS, unlike the Arctic Council in particular, has not sponsored legal instruments to further its activities or enhance its status. The intergovernmental bodies of relevance for the Baltic Sea Area that are regulated by treaty law, in particular the Nordic Council and Nordic Council of Ministers and the Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area, with its Baltic Marine Environment Protection Commission (HELCOM) in Helsinki, were established long before the CBSS.<sup>71</sup> There are no direct institutional links between them and the CBSS, although HELCOM is one of the Strategic Partners of the CBSS<sup>72</sup> while nine Baltic Sea States and the EU are both Contracting Parties to the Helsinki Convention and Members of the CBSS. True, the membership of the EU in the CBSS has been somewhat ambiguous, as it was the 'Commission' which at the beginning was defined as a Member. The internal EU law ambiguities notwithstanding,<sup>73</sup> it would seem that the initial description of the Commission as being a Member should be seen as an anomaly and that the Commission should be seen as the representative of the EU, it being understood that it is the Union itself (before 1 December 2009, the European Community) which has been the Member (and as noted in

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<sup>70</sup> See Article 2 of the Agreement.

<sup>71</sup> The Nordic Council is a peculiar cooperation forum for representatives of the popularly elected parliaments and other assemblies of the five Nordic countries and those of the Faeroe Islands, Greenland and the Åland Islands, with participation also from the respective governments, while the Nordic Council of Ministers is of a clearly more intergovernmental nature. Both organisations are regulated in the Helsinki Treaty of Co-operation between Denmark, Finland, Iceland, Norway and Sweden of 1962, as amended. The Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea was first concluded in 1974. A new Convention was adopted in 1992. This Convention has ten Contracting Parties, thus two less than the Members of the CBSS (Iceland and Norway are not parties to the 1992 Helsinki Convention).

<sup>72</sup> HELCOM is one of the seventeen Strategic Partners. The CBSS has identified Strategic Partners so that regional cooperation in and with the Baltic Sea area can continue to advance and intensify [<http://www.cbss.org/council/>]

<sup>73</sup> As pointed out earlier, at note 16 above, it is the EU, not the Commission, which is a subject of international law and which can enter into international agreements and other commitments. Such commitments must, as a general rule, be adopted by the EU Council (although the Commission, as a rule, represents the EU on the international scene, including as a negotiator, see Articles 17 TEU and 218 TFEU and Case C-425/13 *Commission v Council* EU:C:2015:483 and Rosas, n 16 above).

section 3 above, current CBSS documents refer to the ‘European Union’ rather than the Commission).

It is interesting to note that the lack of legal instruments regulating the status and activities of the CBSS has not prevented a rather far-reaching institutionalisation. As explained above, the CBSS, apart from the Council itself, its Presidency, the CSO and Secretariat, has a vast amount of expert groups, task forces, and other bodies, dealing with a broad range of activities and cooperating on a large scale with other entities, notably the Observers and Strategic Partners. Its institutional structure is more developed than is the case with regard to the Arctic Council and the BEAC, it has an active secretariat and long-term strategies in place – thus institutions and areas of action that the sister organisations could learn from and possibly follow.

But why have the states chosen these soft-law organisations in general? It is obvious that law can play an important role in creating a basis for, and furthering, international co-operation. One important function that we associate with law is generating trust, especially in laying down foundations for international co-operation. For instance, Finland, in its 2013 Arctic strategy suggested exploring the possibility of formalizing the Arctic Council but all other Arctic states rejected this possibility.<sup>74</sup> The question is what would be the added value of having a legal foundation for these soft-law organisations. It is not clear to us what additional value the adoption of international treaties would have for generating trust, given that these regional organisations already seem to be taken as well-established and capable of continuing their work into the future, having long-term plans in place (as pointed out in section 2, the 2017 Reykjavik Declaration confirms that this also applies to the CBSS, despite

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<sup>74</sup> Finland’s Strategy for the Arctic Region 2013, 14; Para 6.2, 44; 60: The Arctic dimension is an important part of Finland’s foreign policy: The Arctic Council’s institutional role has been growing following the establishment of the permanent secretariat, the conclusion of binding international agreements and the extension of the Council’s agenda. Finland supports the continuation of this development and the recognition of the Arctic Council as a treaty-based international organisation.

<sup>75</sup> M Byers with J Baker, *International Law and the Arctic* (Cambridge, Cambridge University Press, 2013), 9 seems to suggest that the Arctic Council already has a legal foundation, based on regional customary law. He states that ‘although the Arctic Council is based on a declaration rather than a founding treaty, such a treaty is not a necessary condition for an international organization. The Organisation for Security and Cooperation in Europe (OSCE) is based on the Helsinki Declaration and has similarly evolved from an inter-governmental forum into an international organization . . .’. The author also states that the eight member states created a permanent secretariat, arguably transforming the Arctic Council from an inter-governmental forum into an international organisation.

some earlier discussions as to the future of this organisation).<sup>75</sup> That said, there are already binding agreements relating to the status of their secretariats, and the Arctic Council and the BEAC have shown that these soft-law organisations can, if need be, catalyse legally binding agreements between the member states. As to the need for founding treaties of a legally binding nature, the member states do not seem enthusiastic, at least for the time being. As explained in section 2, the situation is similar with respect to the OSCE.

## **6. Concluding Observations: Perspectives and Challenges**

While the establishment of the CBSS, in 1992, was clearly furthered by the improvements in the political relations between Northern European countries that had taken place after the fall of the Berlin wall in 1989 and the dissolution of the Soviet Union in 1991, subsequent political developments of a more negative nature, whilst not calling into question the very existence of the CBSS, have had a bearing on the functioning of the organisation. This has been particularly obvious during recent years, when relations between the EU and EEA Member States, on the one hand, and Russia, on the other, have deteriorated.<sup>76</sup> In this situation, it has not been possible, since the Summit of May 2012<sup>77</sup> and the Ministerial Session of June 2013,<sup>78</sup> to convene a Summit of the Heads of Government or a Council meeting being attended by all foreign ministers.

This has been different in the Arctic Council and the BEAC, even if these co-operation forums have had both Russia and Western states as their members. Co-operation within these two organisations has continued unabated, and even assumed more ambitious forms, as testified, inter alia, by the recent Fairbanks ministerial meeting of the Arctic Council, in which, for instance, a new legally binding agreement was signed.<sup>79</sup> It was also the first ever ministerial meeting which was attended by all the foreign ministers of the eight Arctic states.

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<sup>76</sup> Concerning the sanctions ('restrictive measures') which the EU has undertaken against Russia because of the situation in Ukraine see, eg Case C-72/15 *Rosneft* EU:C:2017:236.

<sup>77</sup> 9<sup>th</sup> Baltic Sea States Summit, Stralsund, Germany, 31 May 2012.

<sup>78</sup> Declaration of the 18<sup>th</sup> CBSS Ministerial Session, Pionersky, the Kaliningrad Region of the Russian Federation, 6 June 2013.

<sup>79</sup> See at n 62 above.



One of the reasons for this difference seems to be that the Arctic Council and the BEAC have mostly dealt with environmental protection and sustainable development issues, whereas the CBSS has engaged itself in much more demanding fields of activity, such as co-operation on border control, civil protection, nuclear and radiation safety, trafficking in human beings or organised crime.

As was noted above (see section 2 in particular), however, a CBSS meeting of deputy foreign ministers of June 2016 reaffirmed the 'core role of the CBSS as a forum for all multilateral intergovernmental cooperation and dialogue in the Baltic Sea Region'<sup>80</sup> and in the Reykjavik Declaration of June 2017, reference is even made to the possible further strengthening of the role of the CBSS, including the setting up of an independent group of wise persons to submit a report with recommendations before the end of the Swedish Presidency in summer 2018. This together with the continuing functioning of the CSO and other bodies and activities in different fields attest to the fact that despite the political problems, the CBSS continues to operate fairly actively especially at a functional and expert level.

That said, while our discussions with people involved in various CBSS activities indicate that at least some of the projects coordinated by the CBSS have brought added value and could be said to have had some practical impact, it remains the case that the CBSS is generally not equipped to bring about immediate changes in legislation or practice and that the main nature of its activities is to run, coordinate or participate in projects, initiate and coordinate networks, organise meetings, and so on, which, on the other hand, may of course have indirect effects of various sorts.

It deserves to be added that the CBSS has paved the way for its sister organisations to engage in long-term strategic planning. As noted in section 4, the CBSS has had a long-term strategy in place, called 'Regional Identity, Sustainable and Prosperous Region and Safe and Secure Region'. Of interest is also that the CBSS has high level representatives engaged in realising the vision of sustainable development in the Baltic Sea Region, in line with the UN 2030 Agenda and the organisation decided to elaborate an Action Plan of cooperative and

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<sup>80</sup> Warsaw Declaration: Regional Responses to Global Challenges, Meeting of Deputy Foreign Ministers of the Council of the Baltic Sea States, Warsaw, 8 June 2016.

synergistic work on sustainable development.<sup>81</sup> Currently, the Arctic Council is exploring the possibility of adopting a long-term plan as an instrument to guide all the various activities that take place in the Council.<sup>82</sup> Finland as the current chair country has proposed that during its chairmanship, the Arctic Council should try to come up with a plan on how to implement Agenda 2030 in the Arctic.<sup>83</sup>

To sum up and conclude: The three regional ‘soft’ organisations considered here display an interesting example of functional and pragmatic forms of institutionalised cooperation between governments and other actors, including both intergovernmental organisations such as HELCOM and non-governmental bodies, without having a firm foundation grounded in binding treaty law. Especially the case of the CBSS – as is the case with the OSCE – demonstrates that ‘soft’ organisation does not exclude a rather far-reaching institutionalisation as well as a conspicuously broad range of activities. As was noted in the above-mentioned Warsaw Declaration of 2016, the CBSS aspires to be a ‘forum for all multilateral intergovernmental cooperation and dialogue in the Baltic Sea Region’.

That said, the lack of a clear legal status and mandate for the CBSS, combined with the modest resources of the organisation and the limited size of its secretariat, seem to call for some caution in describing it as overall coordinator of all Baltic Sea Area intergovernmental activities. The more legally ingrained organisations, notably the EU, HELCOM and the Nordic Council and Nordic Council of Ministers, not to speak of the Baltic Sea States themselves, have their own institutions, powers and mandates which cannot be subordinated to CBSS scrutiny. Taking also into account the existence of many other governmental, quasi-governmental and non-governmental forums and bodies which are active in the Baltic Sea Area, it seems obvious that the overall picture of governance and institutions in this region will remain complex and

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<sup>81</sup> See at n 56 above.

<sup>82</sup> See para 34 of the Fairbanks Declaration 2017, ‘Recognize that the Arctic Council continues to evolve, responding to new opportunities and challenges in the Arctic, and instruct the Senior Arctic Officials to develop a strategic plan based on the Arctic Council’s foundational documents and subsidiary body strategies and guiding documents, for approval by Ministers in 2019.

<sup>83</sup> Finland’s Chairmanship Program for the Arctic Council 2017-2019, 5, ‘Finland proposes to explore how the Agenda 2030 framework can be used in Arctic cooperation’

in some respects even bewildering and that the CBSS does not possess the powers or mandate to 'clean up the mess'.

This diversity is not necessarily a big problem, as long as cooperation continues and produces tangible results. Moreover, existing links between the various actors may alleviate problems of coordination. The role of the EU, with its Strategy for the Baltic Sea Region, is particularly important, as it is both a Member of the CBSS, a Contracting Party to the 1992 Helsinki Convention and a partner in the Northern Dimension policy framework.

At least for the time being, we would not advocate any 'legalisation' of the status and mandate of the CBSS. Perhaps the organisation, taking into account its limited resources and manpower (as compared notably to the EU), could, on the one hand, further concentrate itself, at a given time, on some activities defined as core areas, combined with a better visibility as well as a stronger result-oriented approach (the Arctic Council and the BAEC seem to offer examples). On the other hand, the CBSS might also be able to do more on promoting visibility and awareness of on-going Baltic Sea Area cooperation, whether handled by the CBSS itself or by other actors. Being 'soft', functional and pragmatic, does not prevent the CBSS from strengthening its role as a hub for information and communication about Baltic Sea Area activities in general, while at the same time adopting a more result-oriented approach to some issues selected as core areas to be handled by the CBSS itself.

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